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 and the Class*

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION**

CHARLES DES ROCHES, on his own behalf and )  
 on behalf of his beneficiary son, R.D., and all others )  
 similarly situated, SYLVIA MEYER, on her )  
 own behalf and all others similarly situated, and )  
 GAYLE TAMLER GRECO, on her own behalf and )  
 on behalf of all others similarly situated, )

Plaintiffs,

v.

CALIFORNIA PHYSICIANS' SERVICE d/b/a )  
 BLUE SHIELD OF CALIFORNIA; BLUE SHIELD )  
 OF CALIFORNIA LIFE & HEALTH INSURANCE )  
 COMPANY; and HUMAN AFFAIRS )  
 INTERNATIONAL OF CALIFORNIA, INC., )

Defendants.

Case No. 5:16-cv-2848-LHK

**PLAINTIFFS' MEMORANDUM IN  
 SUPPORT OF MOTION FOR  
 ATTORNEYS' FEES AND  
 EXPENSES AND INCENTIVE  
 AWARD**

DATE: June 28, 2018  
 TIME: 1:30 p.m.  
 JUDGE: Hon. Lucy Koh  
 CTRM: 8  
 Action Filed: May 26, 2016

\* Not Admitted in the United States District Court for the Northern District of California.

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**NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND EXPENSES AND  
INCENTIVE AWARD**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 28, 2018, at 1:30 p.m., at the United States District Court of the Northern District of California, San Jose Division, before the Honorable Lucy Koh, Plaintiffs Charles Des Roches, Sylvia Meyer, and Gayle Tamler Greco (collectively, "Plaintiffs"), individually and on behalf of those similarly situated, will and hereby do move for an award of attorneys' fees and expenses and class representative incentive awards pursuant to Federal Rule of Civil Procedure 23(h) and in conjunction with their motion for final approval of the settlement of the above-captioned class action.

Plaintiffs' motion is made pursuant to Federal Rule of Civil Procedure 23(h) and the Preliminary Approval Order entered by the Court on February 5, 2018 (ECF No. 234). Plaintiffs' motion is based on this Notice of Motion and Motion, the accompanying Memorandum in Support of the Motion for Attorneys' Fees and Expenses and Incentive Award, the Declarations of Daniel L. Berger, Steven Herman, and Meiram Bendat, and all exhibits thereto, all pleadings on file, and such other support as may be presented to the Court.

1 Plaintiffs Charles Des Roches, Sylvia Meyer, and Gayle Tamler Greco, on behalf of  
 2 themselves and the Class, respectfully submit their memorandum in support of their motion for an  
 3 award of attorneys' fees and expenses and for incentive awards.

#### 4 INTRODUCTION

5  
 6 Over nearly two years, Grant & Eisenhofer P.A. ("G&E"), Zuckerman Spaeder LLP  
 7 ("Zuckerman"), and Psych-Appeal, Inc. ("Psych-Appeal," and together "Class Counsel")  
 8 diligently litigated this cutting-edge action. These efforts culminated in the very favorable  
 9 settlement for the Class that this Court preliminarily approved on February 5, 2018 (the  
 10 "Settlement"). ECF No. 234. In a separate motion being filed contemporaneously with this one,  
 11 Plaintiffs move for final approval of the Settlement.<sup>1</sup>

12 The Settlement provides Class members with significant and immediate monetary and  
 13 non-monetary relief. Through the Settlement, Class Counsel secured the primary injunctive relief  
 14 they sought: that Defendants will not use the challenged Magellan Medical Necessity Criteria  
 15 Guidelines (the "MNCGs" or "Guidelines") for members of Blue Shield health benefit plans in the  
 16 future, and that no past denials on the basis of those MNCGs shall be relied upon to support future  
 17 medical necessity denials. In addition, Class Counsel secured substantial monetary relief for all  
 18 Class members through a common settlement fund of \$7 million (the "Settlement Amount").  
 19 Given the risks that the Class faced in every phase of this litigation—which, absent a settlement  
 20 would have involved a lengthy trial and likely appeals—and the potential risk to Class members  
 21 during reprocessing, the Settlement is a very favorable one for the Class.

22 Consistent with the preliminary approval order, ECF No. 234, Plaintiffs now ask the Court  
 23 to award attorneys' fees to Class Counsel equal to one-third (33.3%) of the net Settlement  
 24 Amount, *i.e.*, after first deducting any expenses (\$826,705.52), settlement notice and  
 25

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26 <sup>1</sup> Plaintiffs incorporate that motion because it also explains the Settlement and provides justification  
 27 for the relief requested in this motion.

1 administration costs (up to \$150,000.00), and any incentive award to the named Plaintiffs  
 2 (\$20,000.00 for each of the three) that are approved by the Court. After deducting these expenses  
 3 and costs totaling \$1,036,705.52, Class Counsel's fee request amounts to \$1,987,764.83.

4 Because Class Counsel were responsible for creating a common fund and a common  
 5 benefit, shared in by all Class members, it is appropriate for the Court to award attorneys' fees as  
 6 a percentage of the fund created. *See Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016  
 7 WL 613255, at \*14 (N.D. Cal. Feb. 16, 2016), *appeal dismissed* (Aug. 16, 2016) (Koh, J.). The  
 8 fee request is in line with awards in common fund cases of similar size in this Circuit, and is  
 9 warranted by the meaningful monetary and non-monetary relief that Class Counsel obtained for  
 10 the Class, as well as the substantial effort undertaken and risk assumed by Class Counsel. Class  
 11 Counsel handled this matter on a fully contingent basis, actively litigating this case for almost two  
 12 years against well-resourced adversaries, through an extensive discovery process, class  
 13 certification and summary judgment briefing, and trial preparation. The requested award of  
 14 \$1,987,764.83 is eminently fair and reasonable, given that Class Counsel's total lodestar to date,  
 15 reflecting 14,326.80 hours of attorney and professional support staff time, is nearly \$7,500,000.  
 16 Thus, the requested fee amounts to approximately 26% of Class Counsel's actual lodestar. Class  
 17 Counsel also seeks approval to reimburse their out-of-pocket litigation expenses of \$826,705.52,  
 18 and up to \$150,000 for expenses of notice and administration incurred and to be incurred by the  
 19 settlement administrator, Angeion Group. Decl. of Brian Devery ISO Pls.' Mot. for Final  
 20 Approval at ¶ 17. Finally, the Court should approve incentive awards of \$20,000 for each named  
 21 Plaintiff.

## 22 **BACKGROUND**

23 This case arises out of Defendants'<sup>2</sup> creation, adoption, and use of medical necessity rules  
 24 (*i.e.*, the MNCGs) that improperly restricted coverage for residential and intensive outpatient  
 25

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26 <sup>2</sup> The Defendants in this case are California Physicians' Service dba Blue Shield of California  
 27 ("BSC") and Blue Shield of California Life & Health Insurance Company ("BSL," and together

1 treatment of mental health and substance use disorders. Plaintiffs alleged that, by employing the  
2 MNCGs to assess their coverage requests for residential or intensive outpatient treatment,  
3 Defendants used an improper standard, in violation of the uniform terms of the Class members'  
4 health plans (which require use of "generally accepted professional standards" in making medical  
5 necessity determinations) and ERISA.

6 Plaintiffs are three participants in health plans administered by Blue Shield who submitted  
7 coverage requests while the MNCGs were in effect (January 1, 2012 through March 5, 2017) for  
8 residential or intensive outpatient treatment of mental health or substance use disorders on behalf  
9 of their children. Defendants denied Plaintiffs' coverage requests, and subsequent appeals, under  
10 the MNCGs. Plaintiffs filed this lawsuit on May 26, 2016, alleging that Defendants' creation,  
11 adoption, and use of the MNCGs violated ERISA and the terms of the Blue Shield health plans  
12 because the MNCGs do not comport with generally accepted professional standards. Plaintiffs  
13 sought, on behalf of themselves and the Class, an order enjoining Defendants from using the  
14 MNCGs and requiring Defendants to reprocess their coverage requests under new guidelines  
15 consistent with generally accepted professional standards. Defendants answered the initial  
16 complaint on August 5, 2016. Plaintiffs filed the First Amended Complaint ("FAC") on  
17 September 29, 2016. Defendants answered the FAC on October 13, 2016. In their answers,  
18 Defendants denied all liability and asserted numerous affirmative defenses.

19 The parties engaged in extensive fact discovery from August 22, 2016 to July 28, 2017.  
20 During the fact discovery period, Plaintiffs served seven sets of requests for production of  
21 documents ("RFPs") on BSC, five sets of RFPs on BSL, and six sets of RFPs on HAI; five sets of  
22 interrogatories on BSC, four sets of interrogatories on BSL, and four sets of interrogatories on  
23 HAI; and two sets of requests for admission ("RFAs") on BSC, two sets of RFAs on BSL, and one  
24 set of RFAs on HAI. Defendants produced, and Plaintiffs reviewed and analyzed, copious  
25

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26 with BSC, "Blue Shield") and Human Affairs International of California, Inc. ("HAI")  
27 (collectively, "Defendants").



1 datasets and over 550,000 pages of documents responsive to Plaintiffs' RFPs. Plaintiffs deposed a  
2 total of fourteen (14) current or former employees of Defendants (two of whom appeared for  
3 deposition on two separate dates each). Plaintiffs also deposed three (3) third-party witnesses  
4 noticed by Defendants. All three Plaintiffs appeared for deposition and each responded to three  
5 sets of RFPs from Blue Shield and one set of RFPs from HAI, as well as one set of interrogatories  
6 from Blue Shield and one set of interrogatories from HAI. Plaintiffs produced nearly 12,000  
7 pages of documents responsive to Defendants' RFPs.

8       Throughout the fact discovery period, a number of complex discovery disputes arose.  
9 These disputes concerned, *inter alia*, the scope of the parties' requests, the relevance of responsive  
10 documents, the applicability of the attorney work-product doctrine and/or the attorney-client  
11 privilege and the fiduciary exception thereto, and the alleged burden of producing responsive  
12 documents and data. The parties successfully resolved the vast majority of these disputes without  
13 requiring judicial intervention, but this process took effort as reflected in hundreds of pages of  
14 discovery-related correspondence and dozens of hours in telephonic and in-person meet-and-  
15 confer sessions. Magistrate Judge Lloyd resolved the small number of discovery disputes the  
16 parties could not informally resolve. *See* ECF Nos. 144, 150, 153, 158, 188.

17       The parties engaged in expert discovery through October 20, 2017. Class Counsel  
18 expended tremendous effort on expert discovery, as each expert's testimony was vital to the case.  
19 Class Counsel worked closely with each of the experts to develop the case, oversee the expert  
20 reports, and prepare for expert depositions. On August 4, 2017, the parties offered opening expert  
21 reports. Plaintiffs offered the expert reports of Dr. Eric Plakun, Dr. Marc Fishman, and Dr. Louis  
22 Kraus, and on September 1, 2017, each of these experts also submitted rebuttal reports responding  
23 to reports submitted by Defendants' experts. Defendants offered, on August 4, 2017, the reports  
24 of Dr. Stuart Gitlow, Dr. John Chamberlain, and Dr. Thomas Goddard, and on September 1, 2017,  
25 each of these experts also submitted rebuttal reports responding to reports submitted by Plaintiffs'  
26 experts. On September 1, 2017, Plaintiffs offered the rebuttal report of Randall H.H. Madry and  
27 Defendants offered the rebuttal report of Dr. Caitlin Costello. Pursuant to Court order (ECF No.  
28

1 175), Plaintiffs offered the expert report of Adoria Lim on September 15, 2017, and Defendants  
2 offered the rebuttal report of Dr. Bruce Deal on September 29, 2017. The parties completed  
3 expert depositions between September 5, 2017 and October 20, 2017. Each of the expert  
4 witnesses offering reports appeared for deposition.

5 In addition to intensive discovery practice, this litigation involved substantial motion  
6 practice where Class Counsel advanced complex and sometimes groundbreaking theories of  
7 liability and damages. Plaintiffs filed their motion for class certification, accompanied by over  
8 1,500 pages of supporting materials, on April 1, 2017. Defendants' opposition was filed on May  
9 1, 2017. Plaintiffs filed their reply brief on May 15, 2017. In class certification briefing,  
10 Plaintiffs argued, among other things, that as they were challenging Defendants' defective medical  
11 necessity criteria as a whole and seeking a remedy where Defendants would have to reprocess  
12 Class members' claims based on proper criteria, no individualized inquiry into causation was  
13 required. ECF Nos. 86 & 105. The Court granted the motion, except with regard to prospective  
14 relief, on June 15, 2017.<sup>3</sup> ECF No. 123. Defendants sought Ninth Circuit Court of Appeals  
15 review of the Court's order granting class certification pursuant to Rule 23(f) on June 29, 2017, to  
16 which Plaintiffs responded on July 10, 2017. On July 18, 2017, Defendants sought leave to file a  
17 reply in further support of their Rule 23(f) petition, which Plaintiffs opposed on July 28, 2017.  
18 The Ninth Circuit declined Defendants' petition on October 10, 2017.

19 Defendants moved for summary judgment on October 31, 2017, which Plaintiffs opposed,  
20 filing over 700 pages of evidence, on November 14, 2017. Defendants replied on November 21,  
21 2017. In Defendants' summary judgment motion, they raised complex arguments, including that  
22 Plaintiffs lacked proof of an essential element of causation, that HAI was not a fiduciary, and that  
23

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24 <sup>3</sup> On March 5, 2017, Defendants abandoned the MNCGs for residential and intensive outpatient  
25 treatment for members of Blue Shield health benefit plans. ECF No. 123 at 36. Therefore, the Court  
26 held that Plaintiffs lacked standing to enjoin Defendants from using the MNCGs. *Id.* at 36-37. As  
27 part of the Settlement, Defendants commit not to return to the use of the challenged MNCGs for  
28 members of Blue Shield health benefit plans.

1 Plaintiffs' proposed surcharge was not an appropriately tailored remedy. Plaintiffs rebutted all of  
2 these arguments in their opposition. On the same schedule as summary judgment briefing,  
3 Plaintiffs moved to exclude two of Defendants' experts (Drs. Gitlow and Costello) pursuant to  
4 Rule 37 and/or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

5 Following the completion of summary judgment briefing and as the parties prepared for  
6 trial, they were able to reach and finalize the Settlement. The Settlement is the result of an  
7 extensive private mediation process. The parties engaged JAMS mediator Martin Quinn, Esq.,  
8 who met personally with counsel and party representatives for four day-long sessions in San  
9 Francisco, on May 16, October 3, December 11, and December 12, 2017. The parties prepared  
10 comprehensive mediation statements and continued to discuss possible resolutions by telephone  
11 and email, with the assistance of Mr. Quinn, in the intervals between mediation sessions. As a  
12 result of these sessions, and the information obtained in connection with them, Plaintiffs were able  
13 to evaluate the size of the Class, the monetary value of Class members' claims, the risks of  
14 continuing to litigate, and the benefits of the proposed Settlement. After back-to-back mediation  
15 sessions on December 11 and 12, the parties jointly notified the Court that a settlement agreement  
16 had been achieved. ECF No. 222.

17 On February 1, 2018, the Court held a preliminary approval hearing at which the Court  
18 granted preliminary approval of the settlement. On February 5, 2018, the Court issued the order  
19 granting preliminary approval. ECF No. 234.

## 20 **ARGUMENT**

### 21 **I. LEGAL STANDARDS**

22 Rule 23 states that "[i]n a certified class action, the court may award reasonable attorney's  
23 fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P.  
24 23(h). The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a  
25 common fund for the benefit of persons other than himself or his client is entitled to a reasonable  
26 attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

1 In common fund cases in this Circuit, courts usually award class counsel fees as a  
2 percentage of the common fund. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D.  
3 Cal. 2008) (“use of the percentage method in common fund cases appears to be dominant”); *Craft*  
4 *v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1116 (C.D. Cal. 2008) (“the primary basis of the  
5 fee award remains the percentage method”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050  
6 (9th Cir. 2002); *Wakefield v. Wells Fargo & Co.*, No. 3:13-cv-05053 LB, 2015 WL 3430240  
7 (N.D. Cal. May 28, 2015) (awarding percentage of common fund as attorneys’ fees in ERISA  
8 class action settlement). Factors that the court considers when assessing whether the percentage  
9 requested is reasonable include “the extent to which class counsel achieved exceptional results for  
10 the class, whether the case was risky for class counsel, whether counsel’s performance generated  
11 benefits beyond the cash settlement fund, the market rate for the particular field of law (in some  
12 circumstances), the burdens class counsel experienced while litigating the case (e.g., cost,  
13 duration, foregoing other work), and whether the case was handled on a contingency basis.” *In re*  
14 *Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015) (internal quotation  
15 marks omitted) (citing *Vizcaino*, 290 F.3d at 1047-50). Courts also evaluate whether a percentage  
16 award is reasonable by conducting a cross-check against counsel’s lodestar—i.e., the product of  
17 the number of hours worked and counsel’s hourly rate. *Id.* at 949 (citations omitted); *see also*  
18 *Craft*, 624 F. Supp. 2d at 1116-17 (listing eight factors, including reaction of the class and lodestar  
19 comparison).

20 The Ninth Circuit has set 25% of a common fund as the benchmark percentage, and  
21 counseled that the benchmark “should be adjusted . . . when special circumstances indicate that  
22 the percentage recovery would be either too small or too large in light of the hours devoted to the  
23 case or other relevant factors.” *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301,  
24 1311 (9th Cir. 1990). When assessing whether to diverge from the 25% benchmark, courts  
25 consider “the results obtained, risk undertaken by counsel, complexity of the issues, length of the  
26 professional relationship, the market rate, and awards in similar cases.” *Wakefield*, 2015 WL  
27 3430240, at \*5. As in this case, when the common fund is under \$10 million, courts often award  
28

fees above the 25% benchmark. *Craft*, 624 F. Supp. 2d at 1127; *see also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (“Most of the cases Class Counsel have cited in which high percentages such as 30-50 percent of the fund were awarded involved relatively smaller funds of less than \$10 million.”) (citing cases); *Williams v. Brinderson Constructors, Inc.*, CV-15-02474 MWF (AGRx), 2017 WL 490901, at \*4 (C.D. Cal. Feb. 6, 2017) (awarding 33% fee).

**II. A FEE AWARD EQUAL TO ONE-THIRD OF THE COMMON FUND IS FAIR AND REASONABLE IN THIS CASE.**

Consideration of the *Vizcaino* factors in this case confirms that 33.3% of the Settlement amount, after deduction of all approved expenses, costs and incentive awards, is a reasonable fee for Class Counsel in this case.

**A. CLASS COUNSEL ACHIEVED EXCEPTIONAL RESULTS FOR THE CLASS.**

Of the *Vizcaino* factors, “[t]he overall result and benefit to the class from the litigation is the most critical factor in granting a fee award.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046. Further, district courts in the Ninth Circuit consistently have held that, where class counsel achieves significant benefits that are not accounted for in the dollar value of the common settlement fund, the court should consider the value of such relief obtained as a “relevant circumstance” in determining what percentage of the common fund class counsel should receive as attorneys’ fees. *See Perkins*, 2016 WL 613255, at \*14 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003)); *Vizcaino*, 290 F.3d at 1049 (affirming enhanced fee award where “the court found that counsel’s performance generated benefits beyond the case settlement fund”); *Linney v. Cellular Alaska P’ship*, No. C-96-3008 DLJ, 1997 WL 450064, at \*7 (N.D. Cal. July 18, 1997), *aff’d*, 151 F.3d 1234 (9th Cir. 1998) (granting fee award of one-third common fund where settlement provided additional non-monetary relief)).

Here, the Settlement directly benefits the Class in important non-monetary and monetary ways. Defendants will no longer use the challenged MNCGs nor rely on past denials under the challenged MNCGs to support any future medical necessity denials; and they will pay \$7 million

1 to redress prior claim denials under the challenged MNCGs, which represents a substantial  
2 recovery.

3 **1. Defendants' agreement to not resume use of the MNCGs and to not rely**  
4 **on previous denials under the MNCGs to support any future denials are**  
5 **substantial non-monetary benefits to the Class.**

6 Plaintiffs and Class Counsel achieved their primary goal in bringing this case: ending use  
7 of the challenged MNCGs. Defendants stopped using the MNCGs for members of Blue Shield  
8 health benefit plans on March 5, 2017, nine months after Plaintiffs filed their complaint—prior  
9 even to the Court's decision on class certification. As part of the Settlement, Defendants have  
10 agreed that they will not resume use of the MNCGs for members of Blue Shield health benefit  
11 plans in the future. Accordingly, as a result of the Settlement, neither Class members nor any  
12 other participant or beneficiary in plans administered by Blue Shield will ever be denied  
13 residential or intensive outpatient treatment on the basis of the allegedly defective MNCGs  
14 challenged by Plaintiffs.

15 Defendants also have agreed, as part of the Settlement, to issue a bulletin to all personnel,  
16 whether employees or contractors, who conduct medical necessity reviews. This bulletin will  
17 state that previous denials of Class members' coverage requests under the MNCGs shall not be  
18 relied upon to support any future denial of coverage requests on the basis of lack of medical  
19 necessity. At trial, Plaintiffs would have sought an order requiring Defendants to reprocess Class  
20 members' denied requests for coverage. If they had prevailed at trial, and a Class member's  
21 denial was overturned during reprocessing, their file would have reflected that reversal.  
22 Following such a reversal of the denial, the illegitimate denial under the challenged MNCGs could  
23 not have been considered in connection with future requests for coverage. The bulletin remedy  
24 achieves a similar result by explicitly forbidding, and thus eliminating the possibility of, the use of  
25 a past challenged MNCG medical necessity denial being considered during future coverage  
26 determinations. This ensures that Class members will not be prejudiced by a medical necessity  
27 denial based on the challenged MNCGs in the future when they submit coverage requests for  
28 mental health or substance use disorder treatment services.

1                   **2. The Settlement also provides significant monetary benefits to the Class.**

2           Class Counsel obtained significant monetary relief for Class members through a common  
3 fund of \$7 million. The monetary relief achieved through the Settlement is remarkable because  
4 (1) it occurred in a case seeking primarily injunctive relief, and (2) it avoids the issues the Class  
5 members potentially faced in getting reprocessing and then potentially receiving a monetary  
6 benefit payment following reprocessing.

7           The Settlement Fund, which will be distributed to the Class members, will consist of the  
8 \$7 million common fund less notice and administration costs, attorneys' fees and expenses award  
9 by this Court, and any incentive award granted by this Court. The Plan of Allocation sets forth in  
10 detail how that Settlement Fund will be distributed to the Class. In short, the Plan of Allocation  
11 divides the Settlement fund into two "pots": one, to compensate Class members who actually went  
12 ahead and obtained some or all of the treatment for which they had requested coverage, but been  
13 denied; and two, to compensate all Class members, regardless of whether they later obtained  
14 treatment, for the use of the challenged MNCGs to deny requests for coverage.

15           If Plaintiffs had succeeded at trial, Class Counsel would have sought an order directing  
16 Defendants to reprocess Class members' claims under medical necessity rules consistent with  
17 generally accepted standards of care. Under such an order, Defendants would have reconsidered  
18 their denial decisions—at the pre-authorization, concurrent review, and post-service stages—to  
19 determine if the requested residential or intensive outpatient treatment for mental health or  
20 substance use disorders was medically necessary, and thus, should have been covered under the  
21 Class member's health plan. However, Defendants would have argued that only post-service  
22 claimants (*i.e.*, individuals who received the requested treatment and then submitted a request for  
23 coverage that was denied), a fraction of the Class, were potentially entitled, if their denial was  
24 overturned on reprocessing, to benefits. In turn, Defendants would have likely argued that only  
25 those Class members (*i.e.*, post-service claimants) who in their view could receive benefits should  
26 be reprocessed. In other words, those Class members who did not submit a post-service claim, or  
27 who could not afford the treatment, or who otherwise decided not to obtain treatment after being  
28



denied coverage, under Defendants' theory, would not even be entitled to reprocessing. If Defendants prevailed on this argument, many Class members' claims would not have been reprocessed *even if Plaintiffs prevailed at trial*—leaving those Class members with no monetary benefit recover at all. Even if Defendants did not prevail on this argument and, thus had to reprocess all claims, it is likely that Defendants would have maintained that the requested treatment was not medically necessary for a substantial number of Class members, and thus would have denied coverage and/or benefits even after post-trial reprocessing—leaving those Class members with no monetary benefit recovery at all. Those Class members would then have had to decide whether to pursue internal, and then potentially external, appeals of those denials, consuming Class members' time and resources in the process. And, for Class members who Defendants determined were entitled to benefits, Defendants would likely have sought to subject those claims to deductibles, co-pays, and other co-insurance obligations.

The Settlement avoids all of these significant contingencies, from the reprocessing procedure and its associated uncertainties to the claim payment uncertainties that would adhere to such a court-ordered remedy, and instead (pursuant to the Plan of Allocation), provides definitive and significant monetary benefits to *all* Class members immediately.

### **3. The scope of the release provided by Class members is reasonable.**

As part of the Settlement, Class Counsel also negotiated a reasonable release that tracks the allegations in the complaint. Mot. for Final Approval at 5-6; *see also* Stipulation of Settlement, ECF No. 225-1 at Section 1.14.

### **4. Conclusion**

In short, Class Counsel achieved a remarkably favorable result for the Class with respect to both non-monetary and monetary relief.

#### **B. CLASS COUNSEL FACED RISKS LITIGATING THIS COMPLEX CASE THROUGH TRIAL AND APPEAL.**

There were two principal roadblocks that made this case extraordinarily risky: (1) whether Plaintiffs could have obtained certification of a class; and (2) whether Plaintiffs could establish, at summary judgment and trial, that the MNCGs were improper and did not comply with generally



1 accepted medical practice. On the first, Class Counsel pioneered the legal theory of challenging  
2 allegedly defective medical necessity guidelines as a breach of fiduciary duty and seeking  
3 reprocessing as a class wide injunctive remedy. *See, e.g., Wit v. United Behavioral Health*, 317  
4 F.R.D. 106 (N.D. Cal. 2016) (class certified challenging internal guidelines where the class was  
5 represented by Zuckerman and Psych-Appeal). There have only been a handful of ERISA class  
6 actions that challenged internal guidelines as being a breach of fiduciary duty. In these cases,  
7 plaintiffs often have failed to obtain class certification. *See, e.g., Dennis F. v. Aetna Life Ins.*, No.  
8 12-CV-02819-SC, 2013 WL 5377144, at \*4 (N.D. Cal. Sept. 25, 2013) (denying class certification  
9 where plaintiff: (i) challenged Aetna's application of the LOCAT guidelines, rather than the  
10 guidelines themselves, and (ii) sought court-ordered benefit payments as a remedy). Here,  
11 Plaintiffs succeeded in their motion for class certification, seeking declaratory and equitable relief,  
12 including reprocessing of denied claims. Plaintiffs also successfully defeated Defendants' Rule  
13 23(f) petition. Even with this, it was virtually certain that Defendants would continue to dispute  
14 certification, either via a decertification motion or on appeal following trial.

15 On the second principal risk, although Plaintiffs and Class Counsel believed that their  
16 theories of liability were cognizable under ERISA, and that they could substantiate them with  
17 evidence (including extensive expert testimony), the relative novelty of Plaintiffs' claims meant  
18 that they faced risks at summary judgment, at trial, and on appeal. Indeed, Defendants contested  
19 liability and vigorously disputed the case on the merits. Defendants retained five individuals to  
20 serve as experts and support their defenses—three of whom, Drs. Stuart Gitlow, John  
21 Chamberlain, and Caitlin Costello, were offered as clinical experts who opined in their reports and  
22 depositions that, contrary to Plaintiffs' core argument, the MNCGs did comport with generally  
23 accepted standards of care. Defendants' doctors also provided rebuttal reports in response to  
24 Plaintiffs' experts' reports, which further set up a potential for dueling experts at trial. Defendants  
25 moved for summary judgment, filing approximately 250 pages of evidence and arguing, among  
26 other things, that Plaintiffs lacked proof of the essential element of causation on their fiduciary  
27 duty and wrongful denial of benefits claims, that HAI was not a fiduciary, and that Plaintiffs were  
28

not entitled to their proposed surcharge relief.<sup>4</sup> At trial, Defendants would have put on their experts, other witnesses, and exhibits to support their position that the MNCGs were not overly restrictive and were in accordance with generally accepted standards of care. While Class Counsel believes they had a strong case on the merits, Plaintiffs were not assured of prevailing in whole or even in part. Even after success at trial, there was a substantial likelihood that Defendants would file an appeal challenging Plaintiffs' legal theories and evidence.

Accordingly, the complexity of the claims presented and the uncertainty arising from the litigation favor the award here.

**C. CLASS COUNSEL'S HOURLY RATES ARE REASONABLE AND THE LODESTAR CROSS-CHECK DEMONSTRATES THAT CLASS COUNSEL REQUESTS FAR LESS THAN THEIR LODESTAR IN ATTORNEYS' FEES. BOTH OF THESE CONSIDERATIONS SUPPORT THE ATTORNEYS' FEES REQUESTED IN THIS MOTION.**

**1. Class Counsel risked nonpayment and litigated the case on full contingency, forgoing paid hourly work at established rates.**

The *Vizcaino* factors include consideration of how counsel's hourly rates compare to the market rate for the particular field of law, the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration, foregoing other work), and whether the case was handled on a contingency basis. *In re Online DVD-Rental Litig.*, 779 F.3d at 954-55. Each of those factors also strongly supports the requested 33.3% fee.

**a. Class Counsel's hourly rates are reasonable.**

Class Counsel, Zuckerman, G&E, and Psych-Appeal, have been recognized in the field of complex ERISA litigation, including class actions, on behalf of plaintiffs. Although there are other law firms that may charge lower rates to represent ERISA plaintiffs in individual or less complex class cases, Plaintiffs respectfully submit that none of them have the track-record or expertise that this case required. Indeed, Class Counsel's expertise and the concomitant reasonableness of Class Counsel's rates is reflected by the fact Class Counsel is regularly retained

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<sup>4</sup> The Court denied Defendants' summary judgment motion as moot based on the parties' representation to the Court that they had reached a settlement. ECF No. 223.

by clients to work on an hourly basis and that those clients pay the same rates that Class Counsel has submitted here.

**i. Zuckerman Spaeder LLP**

Founded in 1975, Zuckerman is a national litigation boutique that represents individual and institutional clients in high-stakes civil and criminal cases. Herman Decl. ¶ 7. Zuckerman's health care practice, led by D. Brian Hufford and Jason Cowart, challenges health insurer practices, primarily through ERISA, and is at the vanguard of an entirely new insurance recovery legal practice. *Id.* Through the firm's health care practice group, Zuckerman has helped shift the balance of power between health care providers and commercial insurers—winning cases that expanded provider rights, delivered unprecedented monetary wins, and forced insurers to reform their practices. *Id.* Some of these cases are discussed in more detail in the accompanying Declaration of Steven Herman. *Id.* at ¶¶ 8-10. In 2017, Law360 named Zuckerman's health care practice its "Health Care Practice Group of the Year." *Id.* at ¶ 7.

Zuckerman charged its standard hourly rates in this case. *Id.* at ¶ 13. Those rates, which are set to align with the rates of peer firms, compare favorably to the market rate in this type of complex case.<sup>5</sup> Indeed, Courts, including in this Circuit, have recognized the reasonableness of these rates in similar cases. *See, e.g., Weil v. Cigna Health & Life Ins. Co.*, No. 14-CV-07074-MWF-JPR, 2017 WL 3737851, at \*4 (C.D. Cal. Aug. 29, 2017) (granting Zuckerman's motion for attorneys' fees in ERISA class action).<sup>6</sup> The rates billed by Zuckerman in this case and other contingency matters reflect the firm's standard hourly rate paid by the firm's clients, including in other complex ERISA cases, and do not take into account the assumption of risk that comes from taking cases on a full contingency basis, as was done in this case. *Id.* Approximately 90% of

<sup>5</sup> The 2018 hourly rates of Zuckerman's primary attorneys involved in the case are: Mr. Cowart (\$900 per hour) and Ms. Peyser (\$500 per hour) in New York City; and Mr. Herman (\$720 per hour) in Washington DC.

<sup>6</sup> Courts in this Circuit have also generally approved of rates in this range. *See In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-CV-5944 JST, 2016 WL 721680, at \*43 (N.D. Cal. Jan. 28, 2016) (citing cases).

1 Zuckerman's revenue is generated by hourly fee paying business, with a small minority of revenue  
2 generated by contingent fee litigation. *Id.*

3 **ii. Grant & Eisenhofer, P.A.**

4 Since its inception in 1997, G&E has grown into one of the country's most successful  
5 plaintiff advocacy firms. Berger Decl. ¶ 7. Often a leader in breaking new ground for its clients  
6 in litigation throughout the world, G&E represents clients in securities, M&A, corporate  
7 governance, asset recovery, appraisal, antitrust, bankruptcy, false claims, consumer protection,  
8 health care, pharmaceutical, and medical device litigation, environmental litigation, and  
9 intellectual property litigation. *Id.* Among its many accolades, G&E has consistently been named  
10 one of the top plaintiff firms in the U.S. by *The National Law Journal*, has twice been cited by  
11 RiskMetrics Group for securing the highest average investor recovery in fraud class actions of any  
12 law firm in the U.S., and was named one of the "Most Feared Plaintiffs Firms" by *Law360* for  
13 several years in a row. *Id.* at ¶ 8.

14 The G&E attorneys chiefly responsible for litigating this action are Daniel Berger  
15 (partner), Kyle McGee (senior counsel), and Rebecca Musarra (associate). *Id.* at ¶ 9. As set forth  
16 in the accompanying Declaration of Daniel Berger, the G&E attorneys involved in leading this  
17 litigation have significant experience representing plaintiffs in class actions.<sup>7</sup> *Id.* at ¶¶ 10-12.  
18 G&E's rates are comparable to the rates of Zuckerman, which are set forth above, and other firms  
19 engaged in complex litigation. Federal courts in comparable cases have found these rates to be  
20 reasonable. *See, e.g., Okla. Firefighters Pension & Ret. Sys. v. Ixia*, No. CV 13-08440, Final  
21 Order and Judgment, (C.D. Cal. July 29, 2016) (Gee, J.).

22 **iii. Psych-Appeal, Inc.**

23 Psych-Appeal is the country's first private law firm exclusively devoted to mental health  
24 insurance advocacy. Bendat Decl. ¶ 7. Psych-Appeal was established in 2011 by Meiram Bendat,

25 \_\_\_\_\_  
26 <sup>7</sup> The 2018 hourly rates for G&E are \$975 for Mr. Berger, a director in New York City, \$625 for  
27 Mr. McGee, senior counsel in Wilmington, Delaware, and \$495 for Ms. Musarra and Mr. Yu,  
associates in Wilmington, Delaware. Berger Decl. ¶ 13.

1 an attorney and psychotherapist (M.A. in clinical psychology and a Ph.D. in psychoanalytic  
 2 science) with extensive clinical experience treating children, adults, and families in outpatient and  
 3 inpatient settings. *Id.* Due to his unique background in law and mental health, Dr. Bendat has been  
 4 able to challenge previously unexposed managed care abuses that systematically deprive patients of  
 5 access to mental health treatment. *Id.* at ¶ 8. His cases have been reported on by 60 Minutes,  
 6 National Public Radio, *The New York Times*, *Forbes*, and *Psychiatric News*. *Id.* Widely regarded a  
 7 national authority on mental health parity and access, Dr. Bendat consults to various consumer and  
 8 provider organizations such as the National Council for Behavioral Health, National Association of  
 9 Psychiatric Health Systems, Parity Implementation Coalition, and The Kennedy Forum. *Id.* at ¶ 9.  
 10 Along with co-counsel at Zuckerman and G&E, he has spearheaded cutting-edge mental health  
 11 parity and medical necessity litigation around the country. *Id.* at ¶ 10.

12 Dr. Bendat uncovered the underlying allegations in this matter and has served as co-  
 13 counsel for the duration of the case. *Id.* at ¶ 13. His 2018 rate is \$750 per hour, which is set to be  
 14 competitive in the field of complex ERISA litigation and in the Los Angeles market. *Id.* at ¶ 17.  
 15 Courts in this Circuit and others have approved fee awards at this hourly rate for Dr. Bendat. *See*,  
 16 *e.g.*, *Craft v. Health Care Serv. Corp.*, No. 14 C 5853, Final Order and Judgment Approving  
 17 Settlement (N.D. Ill. Feb. 26, 2018); *Weil*, 2017 WL 3737851, at \*4.

18 **b. This case was handled on a fully contingent basis at the expense**  
 19 **of hourly work.**

20 Class Counsel took the case as a full-contingency matter, increasing their risk of  
 21 nonpayment and exposure in the event of an unsuccessful outcome. Herman Decl. ¶¶ 6, 20-23.  
 22 By taking on the case, G&E, Zuckerman, and Psych-Appeal invested time in a matter with an  
 23 uncertain outcome rather than applying that time in hourly cases with regular payment at their  
 24 hourly rates, and at the expense of other opportunities, on both contingency and non-contingency  
 25 bases. *Id.*

1                   **2.       A 33.3% fee award will result in attorneys' fees amounting to**  
 2                   **significantly less than Class Counsel's lodestar.**

3                   A lodestar cross-check confirms that the 33.3% requested fee award is reasonable. In fact,  
 4 a 33.3% fee award will result in Class Counsel receiving a fee award that is considerably less than  
 5 its lodestar. When performing a lodestar cross-check, "current rates, rather than historical rates,  
 6 should be applied in order to compensate for the delay in payment." *Wakefield*, 2015 WL  
 7 3430240, at \*5 (citing *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998)); *see also*  
 8 *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) ("The district  
 9 court has discretion to compensate delay in payment in one of two ways: (1) by applying the  
 10 attorneys' current rates to all hours billed during the course of litigation; or (2) by using the  
 11 attorneys' historical rates and adding a prime rate enhancement.").

12                   Litigating this case was demanding and required tremendous time, effort and expertise.  
 13 Class Counsel engaged in intensive discovery practice, including drafting discovery requests and  
 14 responses, reviewing discovery requests and responses, reviewing over 550,000 pages of  
 15 documents and data compilations produced by Defendants, resolving a number of complex  
 16 discovery disputes, preparing for and conducting depositions of fourteen current or former  
 17 employees of Defendants and three third-party witnesses, assisting Plaintiffs' four experts in  
 18 preparing reports and sitting for depositions, and analyzing reports of and deposing Defendants'  
 19 five experts. Herman Decl. ¶ 19. Class Counsel also engaged in extensive motion practice,  
 20 including briefs in support of class certification, in opposition to Defendants' Rule 23(f) motion to  
 21 the Ninth Circuit Court of Appeals, in opposition to summary judgment, and in support of their  
 22 Rule 37 and/ or *Daubert* motion to exclude experts. *Id.* As a result of vigorously litigating this  
 23 case almost to trial, Class Counsel have collectively spent 14,326.80 hours on this matter, with a  
 24 total lodestar of \$7,492,448.00 and additional time will be spent overseeing claims administration  
 25 and preparing for and attending the fairness hearing. Herman Decl., Ex. A.

26                   As stated above, using the current rates, Class Counsel's lodestar is approximately  
 27 \$7,492,448.00. *See* Herman Decl., Ex. A. Thus, even before considering the additional work that  
 28

Class Counsel will do to secure final approval of the Settlement and in monitoring and enforcing the Settlement, a 33.3% fee represents only approximately 26% of Class Counsel's lodestar. *See Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, at \*13 (N.D. Cal. Dec. 11, 2015) (granting class counsel 33% common fund fee award where that amount constituted 48% of class counsel's lodestar). Moreover, courts in this Circuit routinely award one-third of the common fund where class counsel litigated the case to this extent. *See, e.g., id.* at \*11 (awarding 33.3% of the common fund where class counsel had litigated "multiple motions to remand, dismiss and transfer, as well as a Ninth Circuit Appeal" prior to settlement); *Burden v. SelectQuote Ins. Servs.*, 2013 WL 3988771, at \*4 (N.D. Cal. Aug. 2, 2013) (awarding 33% of the common fund where "the parties engaged in extensive discovery over several years" and "engaged in what the district court described as 'significant motion practice ...'"); *Ruiz v. XPO Last Mile, Inc.*, No. 5-CV-2125 JLS (KSC), 2017 WL 6513962, at \*7 (S.D. Cal. Dec. 20, 2017) (awarding 35% based on the lengthy life of the case and the lodestar cross-check of 1.78). *Cf. Johnson v. Quantum Learning Network, Inc.*, No. 15-CV-05013-LHK, 2017 WL 747462, at \*4 (N.D. Cal. Feb. 27, 2017) (Koh, J.) (stating "cases in which courts have awarded 30% or more of the common fund have usually involved 'extensive litigation' prior to settlement," and awarding 28% instead of the requested 33% because parties engaged in no motions practice other than motion for preliminary settlement approval).

**D. CLASS MEMBERS HAVE AMPLE OPPORTUNITY TO ASSESS THIS FEE REQUEST.**

Courts can also consider the reaction of the class when assessing the reasonableness of a fee requested by class counsel. *Craft*, 624 F. Supp. 2d at 1117. In this case, in accord with the notice sent to the Class on April 6, 2018, this fee petition is being filed and posted to the Settlement-related website three weeks before the deadline for Class members to opt out of or object to the Settlement. Class Counsel will be prepared to address the reaction of Class members to the fee request in the motion for final approval and at the Final Approval Hearing. The notice sent to the Class thoroughly described the fee to be requested by Plaintiff for Class Counsel.



**III. THE COURT SHOULD AWARD CLASS COUNSEL THEIR OUT-OF-POCKET EXPENSES.**

“Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.” *Williams*, 2017 WL 490901, at \*4 (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Attorneys routinely bill clients for expenses such as travel, filing fees, and attorney service fees, and it is thus appropriate to allow recovery of these costs from the settlement fund. *Id.*

Here, Class Counsel have described their expenses in the Berger, Herman, and Bendat Declarations. Berger Decl. ¶¶ 22-26; Herman Decl. ¶¶ 25-31; Bendat Decl. ¶¶ 23-24. Those schedules of expenses show that Class Counsel litigated the case efficiently, with no unreasonable or unjustified expenditures. *Id.* Indeed, the largest category of expenditure for which reimbursement is sought is professional expert fees. These expert fees and expenses relate to Class Counsel retaining experts to opine on the threshold issue in the case—whether the MNCGs were overly restrictive and not in accordance with generally accepted standards of care—and economic issues related to class-wide damages and relief. The expertise and assistance provided by all of these experts was critical to the prosecution and successful resolution of this action. Each of these experts was, in fact, vital to the successful prosecution and resolution of the case.

Accordingly, Plaintiffs respectfully request that the Court approve payment of these expenses incurred by Class Counsel from the Settlement Amount in the amount of \$826,705.52.<sup>8</sup>

**IV. THE COURT SHOULD GRANT FINAL APPROVAL TO THE INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS.**

Named plaintiffs are eligible for reasonable incentive payments as part of a class action settlement. *Staton*, 327 F.3d at 977. When evaluating the reasonableness of an incentive award, courts may consider factors such as actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the plaintiff’s time and

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<sup>8</sup> In the notice, Class Counsel informed the Class that they intended to seek up to \$850,000 in expenses.



1 effort expended, and reasonable concerns about potential adverse consequences of serving as the  
2 class representative. *Id.*

3 Here, incentive awards of \$20,000 for each named Plaintiff are appropriate because they  
4 are within the range of incentive awards within this Circuit and others,<sup>9</sup> and are warranted given  
5 the emotional and time demands this litigation placed on each named Plaintiff. Berger Decl. ¶¶  
6 27-30. More importantly, neither this action nor the result achieved would have been possible  
7 without the extensive efforts of the Plaintiffs. *Id.* Despite the stigma that still attaches to mental  
8 health disorders, the named Plaintiffs stepped forward to challenge Defendants' MNCGs even  
9 though doing so caused their personal circumstances and conditions to become public. *Id.* Their  
10 willingness to do so led directly to the relief obtained by their fellow Class members under the  
11 Settlement. *Id.* They also made substantial time contributions by collecting and producing  
12 documents, reviewing and approving the complaint and their respective discovery responses,  
13 providing deposition testimony, participating in settlement discussions, and overall oversight of  
14 Class Counsel's work. *Id.* Thus, Plaintiffs respectfully ask the Court to approve \$20,000  
15 incentive awards for each named Plaintiff in connection with the final approval of the Settlement.

### 16 **CONCLUSION**

17 For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) award Class  
18 Counsel fees equal to 33.3% of the net Settlement Amount, or \$1,987,764.83; (2) approve Class  
19 Counsel's request for reimbursement of expenses in the amount of \$826,705.52, and the expenses  
20 incurred and to be incurred by the Settlement Administrator in the amount of \$150,000.00; and (3)  
21 grant a \$20,000.00 incentive award for each named Plaintiff.

22  
23  
24 <sup>9</sup> See *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ("After evaluating  
25 the time Van Vranken committed to this case, the Court finds that an incentive award of \$50,000 is  
26 just and reasonable under the circumstances."); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448,  
27 479–80 (D.N.J. 2008) (awarding \$60,000 incentive award to each named plaintiff, and stating "in  
healthcare cases like this, it is also important to acknowledge that Representative Plaintiffs  
sacrificed personal and medical privacy for the good of the class").

1 Dated: May 15, 2018

Respectfully submitted,

2 /s/ Daniel L. Berger

3 Daniel L. Berger (admitted *pro hac vice*)

4 Kyle J. McGee (admitted *pro hac vice*)

5 Rebecca A. Musarra (Cal. Bar No. 291250)

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